Utusan Melayu (M) Bhd v Othman bin Hj Omar

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1670–10 OF 2015
PRASAD ABRAHAM, KAMARDIN HASHIM AND ASMABI MOHAMAD JJCA
5 DECEMBER 2016

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Tort — Defamation — Libel — Whether trial court rightly found appellant defamed respondent in newspaper article but wrong to have granted separate awards for general and aggravated damages — Whether trial court should have granted global award for damages after taking all material facts into account

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The respondent, who was at the material time a former general manager of Perbadanan Kemajuan Negeri Selangor ('PKNS'), won a suit in the High Court against the appellant for libel and was awarded RM250,000 in general damages and RM50,000 in aggravated damages. The appellant owned, printed, published and distributed the widely-popular *Utusan Malaysia* daily newspaper. On 29 January 2013 the newspaper reported ('the article') that the respondent's contract as general manager might not be renewed after January 2013 because under his leadership PKNS had taken various 'controversial' decisions which caused problems for the Selangor State Government and the political party that formed that government. However, as soon as the appellant knew the respondent's contract would be extended, it published articles to that effect. The respondent alleged that the article, taken as a whole, defamed him, gravely injured his reputation, exposed him to hatred, contempt and ridicule and lowered him in the estimation of right-thinking members of society. The appellant denied the article was defamatory and relied upon the defence of qualified privilege, which defence was rejected by the trial judge. In the instant appeal, the appellant argued that the trial judge erred in: (a) finding that the article had defamed the respondent; (b) holding that the defence of qualified privilege had not been proven; and (c) allowing separate awards for general and aggravated damages.

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Held, dismissing the appeal on the issue of liability but substituting the damages awarded by the trial court with a global sum of RM100,000:

(1) The trial judge's finding that the impugned statements in the article were defamatory of the respondent was correct. He was right to reject the principle laid down in the English cases in determining whether the impugned statements in the article were capable of bearing any meaning defamatory of the respondent. It had always been the case in our jurisdiction that the test to determine whether the words complained of

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were capable of bearing a defamatory meaning was based on the ordinary and natural meaning of the words published. It might be either the literal meaning or the implied or inferred or indirect meaning. It did not require the support of extrinsic facts passing beyond the general knowledge. It was an objective test in which it must be given a meaning a reasonable man would understand it. In order to understand it, the whole article had to be considered (see paras 20–21 & 23).

(2) The trial judge was correct in rejecting the defence of qualified privilege. The grounds of judgment showed the trial judge had sufficiently considered all the evidence and the issues raised. He had taken into account all matters laid down in *Reynold*'s case before coming to the conclusion the appellant had failed to satisfy the court that it was entitled to rely on the defence of qualified privilege (see para 26).

(3) The trial judge erred in law and in fact when he made separate awards for general and aggravated damages which amount of damages awarded was duly excessive. He did not follow the judicial trend in granting damages, which was the global award. The damages awarded had to be varied and reduced to a global sum of RM100,000 after considering various material facts. These were: (a) the nature of what was stated in the article could not be seen as something exceptionally grave; the article never said the respondent was guilty of any wrongdoing; (b) the appellant reported as the matter unfolded; as soon as it knew the respondent's contract would be renewed, it published articles to that effect; (c) the appellant did not report something which might be inaccurate and refused to clarify; (d) the conduct of the trial was not oppressive in any sense towards the respondent; (e) it was never suggested or portrayed that the respondent was of poor character; there was no assassination of the respondent's character; (f) the appellant never pleaded the defence of justification and drop it later; and (g) the article was published on p 24 of the newspaper, not on the front page; nor was it given special prominence (see paras 28–30).

[Bahasa Malaysia summary

Responden, yang pada masa material bekas pengurus am Perbadanan Kemajuan Negeri Selangor ('PKNS') menang guaman di Mahkamah Tinggi terhadap perayu bagi libel dan diberi RM250,000 sebagai ganti rugi am dan RM50,000 sebagai ganti rugi teruk. Perayu memilik, mencetak, menerbit dan mengedarkan akhbar harian *Utusan Malaysia* yang dikenali umum. Pada 29 Januari 2013, akhbar tersebut melaporkan ('artikel') bahawa kontrak responden sebagai pengurus am mungkin tidak dibaharui selepas Januari 2013 kerana bawah pimpinannya, PKNS mengambil pelbagai keputusan berkontroversi yang menyebabkan masalah kepada Kerajaan Negeri Selangor dan parti politik yang membentuk kerajaan. Walau bagaimanapun, sebaik sahaja perayu mengetahui kontrak responden akan dilanjutkan, perayu

menerbitkan artikel sedemikian. Responden mendakwa artikel tersebut, dilihat secara keseluruhannya, memfitnahnya dan menjejaskan reputasinya, mendedahkannya kepada kebencian, penghinaan dan tomahan dan merendahkannya di mata ahli masyarakat yang munasabah. Perayu menafikan bahawa artikel tersebut memfitnahnya dan bersandar pada pembelaan perlindungan bersyarat dan ini ditolak oleh hakim bicara. Dalam rayuan ini, perayu menghujahkan bahawa hakim bicara terkhilaf dalam: (a) memutuskan artikel tersebut memfitnah responden; (b) memutuskan pembelaan perlindungan bersyarat tidak dibuktikan; dan (c) membenarkan award berasingan bagi ganti rugi am dan teruk.

Diputuskan, menolak rayuan terhadap liabiliti tetapi menggantikan ganti rugi yang diawardkan oleh mahkamah bicara dengan jumlah global sebanyak RM100,000:

(1) Dapatan hakim bicara bahawa kenyataan-kenyataan yang dipersoalkan memfitnah responden adalah betul. Beliau bertindak betul apabila menolak prinsip yang dinyatakan dalam kes-kes Inggeris dalam memutuskan sama ada kenyataan-kenyataan yang dipersoalkan dalam artikel boleh membawa maksud memfitnah terhadap responden. Sering menjadi pertikaian dalam bidang kuasa kita bahawa ujian untuk memastikan sama ada perkataan-perkataan yang diadu mempunyai maksud memfitnah adalah berdasarkan maksud asli dan biasa perkataan-perkataan yang diterbitkan. Ini boleh jadi maksud harfiah atau maksud yang terselindung atau yang disiratkan. Sokongan fakta ekstrinsik menjangkaui pengetahuan am tidak diperlukan. Ini adalah ujian objektif dalam mana maksud yang boleh difahami oleh orang munasabah mesti diberikan. Untuk memahaminya, keseluruhan artikel mesti dipertimbangkan (lihat perenggan 20–21 & 23).

(2) Hakim bicara bertindak betul apabila menolak pembelaan perlindungan bersyarat. Alasan penghakiman menunjukkan bahawa hakim bicara telah mempertimbangkan semua keterangan dan isu-isu yang dibangkitkan dengan secukupnya. Beliau telah mengambil kira kesemua perkara yang dinyatakan dalam kes *Reynold*'s sebelum memutuskan bahawa perayu gagal memuaskan mahkamah yang ia layak bersandar pada pembelaan perlindungan bersyarat (lihat perenggan 26).

(3) Hakim bicara terkhilaf bawah undang-undang dan fakta apabila beliau membuat award berasingan bagi ganti rugi am dan teruk yang menjadikan ganti rugi yang diawardkan melampau. Beliau tidak mengikut aliran kehakiman dalam memberi award iaitu award global. Ganti rugi yang diawardkan divariasikan dan dikurangkan kepada jumlah global RM100,000 selepas mempertimbangkan pelbagai fakta material. Ini adalah: (a) sifat apa yang dinyatakan dalam artikel tidak boleh dilihat sebagai sesuatu yang sangat serius; artikel tersebut tidak

menyatakan bahawa responden bersalah atas apa-apa salah kesalahan; (b) perayu melaporkan apabila perkara tersebut terungkai; sebaik sahaja tahu kontrak responden akan dibaharui, perayu menerbitkan artikel-artikel tersebut yang membawa kesan; (c) perayu tidak melaporkan sesuatu yang boleh jadi tidak tepat atau enggan memberi penjelasan; (d) perjalanan perbicaraan tersebut tidak menindas responden dalam apa-apa keadaan; (e) tidak pernah dicadangkan atau ditunjukkan bahawa responden mempunyai perwatakan buruk; tiada pemburukkan watak responden; (f) perayu tidak pernah memplidkan pembelaan justifikasi dan menggugurkannya selepas itu; dan (g) artikel tersebut diterbitkan dalam ms 24 akhbar, bukan muka hadapan; ia tidak diberi apa-apa tonjolan (lihat perenggan 28–30).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

A v Bottrill [2003] 1 AC 449, PC (refd)

Cassell & Co Ltd v Broome and Another [1972] AC 1027, HL (refd)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494, CA (folld)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Gillick v British Broadcasting Corporation [1995] Lexis Citation 4598; [1996] EMLR 267, CA (not folld)

Insas Bhd & Anor v David Samuels & Ors [2005] 1 MLJ 115, HC (refd)

Keluarga Communication v Normala Samsudin [2006] 2 MLJ 700; [2006] 2 CLJ 46, CA (refd)

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610; [2009] 5 CLJ 1, CA (refd)

Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609, HL (folld)

Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, HC (refd)

Rubber Improvement Ltd and Another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd (on appeal from Lewis v Daily Telegraph Ltd) [1964] AC 234, HL (refd)

Sani Express Sdn Bhd v Utusan Melayu (Malaysia) Bhd & Anor [2013] 1 LNS 1199, HC (refd)

Shah and Another v Standard Chartered Bank [1999] QB 241, CA (refd)

Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis [1997] 2 All ER 762, CA (refd)

WLP Industrial Solutions (M) Sdn Bhd v KL-Kepong Rubber Products Sdn Bhd [2011] 6 MLJ 623, HC (refd)

Appeal from: Civil Action No 23NCVC-57–06 of 2013 (High Court, Kuala Lumpur)

Gillian Looh (Khairun Nisa with her) (Izral Partnership) for the appellant.
Dhanaraj a/l Vasuderan (M Kalaiselvi with him) (Kamil Hashim Pury & Lim) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court which allowed the respondent's claim for libel for the publication of an article entitled 'Dikatakan banyak timbul kontroversi ketika menerajui PKNS — Kontrak Othman tak disambung?' ('the said article') in *Utusan Malaysia* newspaper on 29 January 2013. We dismissed the appellant's appeal on the issue of liability but reduced the quantum of damages awarded by the learned trial judge. We append below our grounds in doing so.

FACTS

[2] The facts presented in the court below are not really in dispute. The appellant is the owner, printer, publisher and distributor of the mainstream newspaper known as 'Utusan Malaysia', a daily publication with wide distribution to the general public throughout Malaysia. The respondent at the material time was working as the general manager of Perbadanan Kemajuan Negeri Selangor ('PKNS'). In the *Utusan Malaysia* edition dated 29 January 2013, the appellant caused to be published and circulated the said article which the respondent asserted was not true in substance and in fact. The respondent alleged that the said article had gravely injured and defamed his good reputation and standing in society. The respondent further asserted that the appellant had recklessly and maliciously published the defamatory statement in the said article without regards to the truth of facts. The respondent further asserted that the impugned statements in the said article in their natural and ordinary meaning and by reference to its context, meant and were understood to mean that he:

(a) is not capable to be general manager of PKNS;

(b) is a person who likes to make controversial decisions against the then Menteri Besar of Selangor, Tan Sri Abdul Khalid Ibrahim;

(c) is a person who likes to protest against the state government projects;

(d) as the general manager of PKNS has led to a bad perception of the Menteri Besar of Selangor, Tan Sri Abdul Khalid Ibrahim;

(e) is a person who is not eligible to work together with the Parti Keadilan Rakyat ('PKR');

(f) is not fit to have any business dealings with anyone;

(g) is an unscrupulous trader who is dishonest;

(h) is a fraudulent person and has deceived the general public; and

(i) has been managing the financial affairs in a way that is very suspicious and improper.

[3] The respondent alleged that the impugned statements in the said article were capable of lowering the respondent in the estimation of right-thinking members of the society generally or caused him to be shunned or avoided or exposed him to hatred, contempt or ridicule, or to convey an imputation on him that is disparaging or injurious to him in his office and occupation as a general manager of PKNS.

[4] The appellant in its defence denied that the impugned statements in the said article bore, or were understood to bear or were capable of bearing the meanings pleaded in the appellant's statement of claim or any meaning defamatory of the respondent. In the alternative, the appellant pleaded the defence of qualified privilege, giving particulars of the same in its statement of defence.

THE SAID ARTICLE

[5] We set out in full the impugned statement in the said article as below:

> Dikatakan banyak timbul kontroversi ketika menerajui PKNS
>
> Kontrak Othman tidak disambung?
>
> Oleh Helmi Mohd Foad — pengarang@utusan.co.my
>
> Shah Alam 28 Januari 2013 — Kedudukan Othman Omar sebagai Pengurus Besar Perbadanan Kemajuan Negeri Selangor (PKNS) menjadi tanda tanya berikutan kontrak perkhidmatannya yang akan tamat hujung bulan ini masih belum diperbaharui sehingga kini.
>
> Desas-desus menyatakan terdapat kemungkinan kontraknya itu tidak disambung memandangkan sepanjang beliau menerajui perbadanan tersebut banyak kontroversi timbul hingga memalit kesan negatif terhadap pentadbiran Menteri Besar, Tan Sri Abdul Khalid Ibrahim.
>
> Sekiranya benar kontrak Othman tidak disambung, Abdul Khalid yang juga Pengerusi Lembaga Pengarah PKNS mungkin melantik tokoh dalam bidang pembangunan hartanah bumiputera yang mampu memulihkan kembali prestasi perbadanan itu.
>
> Tindakan menukar teraju PKNS dikatakan menjadi salah satu langkah pentadbiran Abdul Khalid untuk memastikan tiada lagi isu berkaitan perbadanan itu yang boleh menjejaskan kerajaan Parti Keadilan Rakyat (PKR) Selangor.

Sumber kerajaan negeri mengesahkan kontrak Othman akan tamat pada 31 Januari ini namun enggan mendedahkan sama ada terdapat lantikan baharu bagi menggantikan beliau atau perkhidmatannya disambung.

'Menteri Besar ada bicang perkara itu tetapi belum ada keputusan akhir. Pengumuman akan dibuat hujung bulan ini,' demikian menurut sumber itu kepada Utusan Malaysia, di sini hari ini.

Sementara itu, Setiausaha Politik Menteri Besar, Faekah Hussin ketika ditanya mengenai perkara itu hanya berkata 'Tunggu sehari dua lagi'.

Othman dilantik sebagai Pengurus Besar PKNS pada 1 Februari 2009 bagi menggantikan Datuk Harun Salim yang bersara pada akhir Oktober 2008.

Sepanjang perkhidmatan Othman, anak syarikat kerajaan negeri itu sering kali dilanda pelbagai isu yang mencetuskan bantahan antaranya rancangan projek komersial di tapak padang PKNS di Petaling Jaya.

Sebelum ini, Menteri Besar dikatakan kurang senang dengan pemberian bonus sebanyak tujuh bulan oleh PKNS kepada kakitangannya sedangkan Lembaga Pengarahnya hanya meluluskan bonus empat bulan.

Selain itu, PKNS turut mengundang bantahan peniaga Kompleks PKNS di Shah Alam pada 2011 kerana didakwa menaikkan sewa premis perniagaan di kompleks tersebut.

Malah, bantahan tercetus sekali lagi pada Oktober tahun lalu setelah perbadanan itu didakwa bercadang menjual lima aset milik anak syarikat kerajaan negeri itu berjumlah RM321 juta.

Lima asset tersebut ialah Menara PKNS Petaling Jaya dengan harga RM90 juta; Shah Alam Mall (RM97 juta); Kompleks PKNS Shah Alam (RM85 juta); Kompleks PKNS Bangi (RM42 juta) dan Wisma Yakin (RM7 juta).

Dalam masa sama, PKNS turut berhadapan desakan rakyat negeri ini yang menuntut anak syarikat kerajaan negeri itu mengambil alih hutang perumahan mereka berjumlah kira-kira RM144.7 juta.

Tuntutan itu dibuat susulan tindakan PKNS yang terbabit dalam proses pengambilalihan hutang Talam Corporation Bhd (Talam).

DECISION OF THE HIGH COURT

[6] After a full trial, the learned trial judge decided that the impugned statements in the said article were defamatory of the respondent as it would tend to lower the respondent in the estimation of right-thinking members of society generally and be likely to affect him adversely in that it would tend to cause others to shun or avoid him and expose him to hatred, contempt or ridicule. The learned trial judge was satisfied that the defamatory words referred to the respondent and that the words were published. The learned trial judge found that the appellant had failed to discharge its burden of proving its pleaded defence of qualified privilege. As such they are not entitled to rely on the said defence. In the final analysis, the learned trial judge allowed the

respondent's claims and awarded general damages of RM250,000, aggravated damages of RM50,000 together with interest at the rate of 5%pa and costs of RM20,000.

THE APPEAL

[7] Before us, learned counsel for the appellant canvassed three core issues as follows:

(a) whether the impugned statements in the said article were defamatory in its natural and ordinary meaning;

(b) whether the appellant had discharged its burden in proving its pleaded defence of justified privilege; and

(c) whether the learned trial judge had erred in law and/or in fact in allowing separate award of general and aggravated damages.

[8] On the first issue as to whether the words in the impugned statements in the said article were defamatory or not, learned counsel submitted that they were not for the following reasons:

(a) after reading the said article once and as a matter of first impression, it is clear that the said article is not defamatory as it merely stated that the respondent's tenure with PKNS would be ending soon and that there had been questions whether his contract with PKNS would be renewed as there were controversies which arose during his tenure;

(b) from the said article it was clear that enquiries were made with the Chief Minister's Office pertaining to the respondent's position but there was no decision on whether the respondent's contract would be renewed. It was also clear from the said article that a decision on the same would be made by the relevant authority;

(c) the said article merely stated that there had been several controversies that arose during the respondent's tenure. The said article did not state that the respondent was a bad general manager or that he was involved in those controversies in a negative manner; and

(d) the learned trial judge had erred in law and/or fact in deciding that the said article is defamatory given that the respondent had failed to plead any extrinsic facts or lead any evidence of such extrinsic facts to support his plea of libel by way of innuendo.

[9] In respect of the second issue relating to the defence of qualified privilege, learned counsel submitted that the learned trial judge erred in his finding as His Lordship had failed to adequately consider, appreciate or give sufficient weight to the following evidence:

(a) respondent's admissions during cross-examination that the said article concerns matters of public interest;

(b) respondent's admission that his appointment as the general manager of PKNS and all subsequent extension of contract were carried out through the Chief Minister's Office;

(c) that the appellant did check with the Chief Minister's Office with regards the extension of the respondent's contract before the publication of the said article;

(d) that the announcement of the respondent's extension of contract was only made on the eve of the expiry of his period of service and that the appellant had published the relevant articles to reflect the same;

(e) the said article did not say or insinuate that the respondent is guilty of any wrongdoing. The said article merely stated that there were controversies during his tenure. The respondent admitted in cross-examination that there were indeed controversies concerning or relating to, amongst others the following matters:

(i) Padang PKNS at Kelana Jaya;

(ii) five major assets of PKNS;

(iii) PKNS' pay and bonus; and

(iv) pressure not to extend the respondent's contract;

(f) the said article did not make any statement of fact that the respondent's contract would not be renewed. It merely raised queries as to whether the respondent's contract would be extended or otherwise; and

(g) the said article was published contemporaneously with the events that were unfolded ie the respondent's contract was due to end on 31 January 2013 and the said article was published on 29 January 2013. This was not a case where the said article was published long after the event.

[10] Learned counsel for the appellant further submitted that the learned trial judge erred in coming to a conclusion that the appellant had acted with malice in publishing the said article. It was argued that the respondent had failed to prove that the desire to injure the respondent was the dominant motive of the said article.

[11] On the issue of damages awarded by the learned trial judge, learned counsel for the appellant submitted that the learned trial judge erred when His Lordship gave a separate award of general damages in the sum of RM250,000 and a special and/or aggravated damages in the sum of

RM50,000. In doing so, learned counsel argued that the learned trial judge had failed to take into account the following evidence:

(a) the respondent had not shown, in law and/or in fact, that it was entitled to separate award of general damages and aggravated damages;

(b) that the nature of what was said in the said article cannot be said to be exceptionally grave. The said article merely questioned whether the respondent's contract would be renewed and had mentioned several controversies that arose during the respondent's tenure. The said article did not mention that the respondent was guilty of any wrongdoing or that he was a person of poor character;

(c) that the appellant reported the matter as it unfolded. As soon as the appellant knew that the respondent's contract would be extended, it published articles to reflect the same; and

(d) the trend in awarding damages is that it is to be based on a global basis and not to split between general damages, aggravated damages and exemplary damages to ensure that the award of monetary damages are not excessive and to avoid double counting in the amount awarded.

[12] Lastly, learned counsel submitted that in all the circumstances of the case, the learned trial judge had erred in law and/or in fact in allowing the relief as set out in the judgment dated 23 September 2015, in particular an order that the appellant was to publish a retraction of the said article in two mainstream newspapers on terms to be agreed by the respondent's solicitors.

OUR DECISION

[13] It is trite that in an action for libel, the burden lies on the respondent to prove that the words complained of are defamatory, that the words refer to the respondent and that the impugned words were published. In the instant appeal before us, it is not disputed that the impugned statements in the said article refer to the respondent as the said article carries the respondent's name and photograph. It is not disputed that there was publication of the same vide *Utusan Malaysia* newspaper dated 29 January 2013. The only question to be determined before us and in the court below was whether the impugned statements were defamatory of the respondent.

[14] The appellant disputed that the impugned statements were defamatory of the respondent based on the actual words used and the context and circumstances of the publication. In construing whether the words complained of are capable of bearing a defamatory meaning, the learned trial judge referred to three decided cases. The learned trial judge relied on Court of Appeal cases of *Keluarga Communication v Normala Samsudin* [2006] 2 MLJ 700; [2006]

2 CLJ 46; *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461 and a decision by the High Court in *Sani Express Sdn Bhd v Utusan Melayu (Malaysia) Bhd & Anor* [2013] 1 LNS 1199.

[15] On the other hand, learned counsel for the appellant in the court below and before us suggested that the principles as laid down in *Gillick v British Broadcasting Corporation* [1995] Lexis Citation 4598; [1996] EMLR 267 as adopted in Malaysia in *Insas Bhd & Anor v David Samuels & Ors* [2005] 1 MLJ 115 be applied. The impression test enunciated in *Gillick*'s case are as follows:

(1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer watching the programme once.

(2) The hypothetical reasonable reader (or viewer) is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

(3) While limiting its attention to what the defendant has actually said or written the court should be cautious of an over-elaborate analysis of the material in issue.

(4) A television audience would not give the programme the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.

(5) In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable viewer the court are entitled (if not bound) to have regard to the impression it made on them.

(6) The court should not be too literal in its approach.

(7) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally.

[16] It is the appellant's contention that in determining the meaning of the impugned statements, the court ought to consider the overall impression of the said article first before considering it against the factual circumstances of the case and the arguments put forward by the parties. Learned counsel for the appellant referred to the House of Lords case of *Rubber Improvement Ltd and Another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd (on appeal from Lewis v Daily Telegraph Ltd)* [1964] AC 234 at pp 259–260 where Lord Reid had said this:

> In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question. So let me suppose a number of ordinary people discussing one of these paragraphs which they had read in the newspaper. No doubt one of them might say — 'Oh, if the fraud squad are after these people you can take it they are guilty'. But I would expect the others to turn on him, if he did say that, with such remarks as — 'Be fair. This is not a police state. No doubt their affairs are in a mess or the police would not be interested. But that could be because Lewis or the cashier has been very stupid or careless. We really must not jump to conclusions. The police are fair and know their job and we shall know soon enough if there is anything in it. Wait till we see if they charge him. I wouldn't trust him until this is cleared up, but it another thing to condemn him unheard'.
>
> What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression.

[17] In determining the meaning of the said article in terms of the context and circumstances of the publication, learned counsel for the appellant cited another English case of *Shah and Another v Standard Chartered Bank* [1999] QB 241 where Hirst LJ made the following observation:

> ... that although each of the publications were capable of imputing actual guilt of money laundering, the words complained of, when considered in their context with the qualifying words and reservations in the surrounding text, were in each case capable of bearing a meaning of no more than reasonable suspicion.

[18] Applying the *Gillick*'s case, counsel for the appellant submitted that the said article is not defamatory in its natural and ordinary on the actual words used and the context and circumstances of the publication based on the following reasons:

(a) a perusal and reading of the actual words of the said article shows that the appellant did not state the matters as pleaded under paras 8 and 10 of the respondent's statement of claim;

(b) the appellant had used qualifying words such as 'didakwa', 'dikatakan', 'kemungkinan' and 'menjadi tanda tanya';

(c) in reading paras 1–8 of the said article, it is clear that the said article did not state that respondent's contract would not be extended or that his contract would not be extended because he was a terrible or lousy general manager;

(d) in reading paras 9–15 of the said article, it is clear that the said article merely set out the several controversies which arose during respondent's tenure (which was admitted by the respondent). It is pertinent to note that the said article did not contain any allegations directed at the

respondent's character or impute that the respondent did not have the quality to carry on with this office; and

(e) the said article merely questioned whether respondent's contract with PKNS would be renewed as there were a number of controversies which arose during his tenure. The said article stated that a decision on whether the respondent's contract would be renewed would be made in a day or two.

[19] The learned trial judge after considering all the above cited cases made the following finding in respect of the first issue (at p 26 of *rekod rayuan tambahan*):

> 20. With the above in mind this Court read the article and putting itself in the shoes of a hypothetical reasonable Malaysian reader and applying the objective test, this Court finds the article not only from the actual words used but from the context and circumstances of publication, to be defamatory as it would tend to lower the Plaintiff in the estimation of right-thinking members of society generally, and be likely to affect him adversely in the estimation of reasonable people generally, in that it wound tend to cause others to shun or avoid him and expose him to hatred, contempt or ridicule.

[20] It is to be noted that the learned trial judge rejected the principle laid down in the English cases in determining whether the impugned statements in the said article were capable of bearing any meaning defamatory of the respondent. At para 19 of the grounds of judgment, His Lordship decided this:

> 19. Notwithstanding that *Gillick* was adopted in *Insas Bhd*, the hypothetical reasonable reader as mentioned in para 18(2) in the English context may have an idiosyncratic variance with the hypothetical reasonable reader in the Malaysian context, owing to differing standards and levels of education, social, cultural and religious differences and values.

[21] We have no reason but to agree with the learned trial judge finding on this issue. It has always been the case in our own jurisdiction as decided in plethora of cases, that the test to determine whether the words complained of are capable of bearing defamatory meaning is based on the ordinary and natural meaning of the words published. It may be either the literal meaning or it may be implied or inferred or indirect meaning. It does not require the support of extrinsic facts passing beyond the general knowledge. It is an objective test in which it must be given a meaning a reasonable man would understand it. In order to understand it, the whole article has to be considered.

[22] In *Keluarga Communications Sdn Bhd*, Zulkefli Makinudin JCA (now CJ Malaya) held as follows at p 708 (MLJ); p 58 (CLJ):

[15] At the outset we would state that the test to be applied when considering whether a statement is defamatory of a plaintiff is well settled in that it is an objective one in which it must be given a meaning a reasonable man would understand it and for that purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. *Gatley on Libel & Slander* (10th Ed) on this point at pp 108 and 110, inter alia, states as follows:

> It is necessary to take into consideration, not only the actual words used, but the context of the words. It follows from the fact that the context and circumstances of the publication must be taken into account, that the plantiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there must be passages which take away the sting.

[23] And in *Chok Foo Choo @ Chok Kee Lian*, Gopal Sri Ram JCA (as His Lordship then was) said as follows at p 374:

> It cannot, I think, be doubted that the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published. As Lord Morris put it in *Jones v Skelton* [1963] 3 All ER 952 at p 958:
>
> > The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.
>
> In my judgment, the test which is to be applied lies in the question: do the words published in their natural ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory. (See *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; [1986] 1 LNS 67) Richard Malanjum J in an admirable judgment in *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304, collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect expressly approve the approach adopted by him.

We therefore are of the view that the finding that the impugned statement is defamatory by the learned trial judge is correct.

[24] On the issue of the defence of qualified privilege, before us the appellant submited that the learned trial judge erred in ruling that the appellant's defence of qualified privilege could not be relied by the appellant. Learned counsel for the appellant argued that His Lordship had failed to give weight to the respondent's various admissions that there were controversies during the respondent's tenure as highlighted in paras 9–15 of the said article, among others, as follows:

(a) the commercial project on the 'tapak padang PKNS' at Petaling Jaya where the respondent admits that no development has been done until the trial date;

(b) during the cross-examination of SD1, the respondent admits that seven months bonus issue was a confidential information obtained by SD1; and

(c) the selling of the five major assets of PKNS.

[25] Learned counsel further argued that the tone of the said article was not accusatory in purport, content and language. The said article did not make statements of fact that the respondent's contract would not be extended. It only raised queries as to whether the respondent's contract would be extended or otherwise. This according to learned counsel was recognised by Lord Steyn in *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609.

[26] We disagree with the submissions of learned counsel for the appellant. Upon perusal of the grounds of judgment of the learned trial judge we found that the learned trial judge had sufficiently considered all the evidence and issues raised before His Lordship. The learned trial judge had taken into account all matters laid down in *Reynolds*'s case before His Lordship came to the conclusion that the appellant had failed to satisfy the court that they were entitled to rely on the defence of qualified privilege. The matters which were considered by the learned trial judge could be found at para 23 of His Lordship's grounds which are as follows (at pp 28–30 additional appeal record):

> 23. The test in *Reynolds* seeks to balance publication in the public interest with responsible journalism. As such this Court proceeds to give due consideration to the above mentioned 10 matters, and its findings are as follows:
>
> (a) the information contained in the article was generally of a type that was of public interest, and these were —
>
> (i) the bonus of 7 months (para 10);
>
> (ii) the raising of rent (para 11);
>
> (iii) selling of the five assets (paras 12–13);
>
> (iv) housing loan arrears of RM144.7m (para 14); and

(v) Talam's debts (para 15)

(b) the defendant's reporter Helmi Mohd Fuad (SD1) then in the article linked these five matters which he relabelled as controversies and converted them into serious allegations against the Plaintiff. However it would be factually incorrect to label these five matters as controversies;

(c) SD1 did not have direct first hand knowledge of the above five matters. He sourced his information indirectly and much of his information was third party opinion speculation and hearsay. Neither did he verify from the plaintiff himself in regard to the five matters, or from other independent and reliable sources. SD1 had therefore not exercised reasonable care in obtaining and verifying the information which became the basis of the article;

(d) That SD1 was told 'Tunggu sehari dua lagi' yet went ahead and published the article could mean one of two things —

(a) that the matter was urgent; or

(b) that SD1 was irresponsible.

Having in mind SD1's overall conduct in the preparation writing of the article leads this court to conclude that (b) was more probable;

(e) the article did not contain the gist of the plaintiff's side of the five matters as it was more accusatory in purport, content and language; and

(f) The circumstances of the highlighting of the five matters in the article and labeling them as controversies just before a decision whether the plaintiff's tenure was to be renewed gave it a slant tainted with what could only be termed as malice.

We therefore agree that the learned trial judge was correct in rejecting the defence of qualified privilege.

[27] We now come to the final issue on quantum of damages. The learned trial judge had awarded general damages in the amount of RM250,000, another RM50,000 as aggravated damages together with interest and costs. In awarding the separate general and aggravated damages, the learned trial judge relied on *Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis* [1997] 2 All ER 762; *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610; [2009] 5 CLJ 1; *Cassell & Co Ltd v Broome and Another* [1972] AC 1027 and *A v Bottrill* [2003] 1 AC 449.

[28] We agree with learned counsel for the appellant that the learned trial judge erred in fact and in law when His Lordship made a separate award for general and aggravated damages which amount of damages awarded was duly

excessive. We observe that the learned trial judge did not follow the judicial trend in granting damages, which is the global award. We found support from the decision in *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494, where the respondent, a Deputy Minister was awarded RM200,000 as a global award of damages. In that case, Gopal Sri Ram JCA had decided this:

> [13] There is one matter of some importance that this case has raised. It appears to be the respondent's argument that separate awards for aggravated and exemplary damages should be made. That is what the High Court did. With respect, we disagree with this approach. For many years it was thought that in all cases of tort global awards should be made, including in claims for personal injuries. However, only in respect of claims for personal injuries, when the courts started awarding interest at different rates on the different heads of damages, it became necessary for courts to make separate awards for pain and suffering and loss of amenities, actual loss of income, future loss and special damages. But in defamation cases it is never the practice to award interest on each separate head of damages. Interest is merely granted on the single award. In our judgment, we should, in defamation cases, maintain the age old practice of making a global award in order to limit the size of awards. Otherwise we will have runaway damages once again. The speech of Lord Hailsham in *Cassel v Broome* appears to fairly support the view we take of the matter.
>
> [14] We have considered and taken into account all the factors operating in the respondent's favour. Yet, we are of the view that the award of RM1,500,000 is manifestly excessive. It is certainly far in excess of the range of awards in defamation cases. In our judgment, having regard to the very special circumstances of this case, an award of RM200,000 is a fair sum by way of a global award of damages. We are conscious that this award is twice the size of those made in recent cases. But it is made to meet the very special circumstances of this case. The award herein includes in it compensatory, aggravated and exemplary damages.
>
> [15] For the reasons already given, this appeal is allowed. The award of RM1,500,000 made by the High Court is set aside. In its place a sum of RM200,000 is substituted.

[29] Later, in *WLP Industrial Solutions (M) Sdn Bhd v KL-Kepong Rubber Products Sdn Bhd* [2011] 6 MLJ 623, Badariah Sahamid J (as Her Ladyship then was) followed the same trend in not awarding separate awards or what Her Ladyship called it as 'double counting' award. At p 635, Her Ladyship decided:

> [35] The judicial trend is not to grant separate awards for exemplary and/or aggravated damages, and a global award should be the practice. *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 3 AMR 189.
>
> [36] This is ensure that awards are not excessive and to avoid 'double counting' as the circumstances giving rise to exemplary/aggravated and general damages are usually inextricably intertwined.
>
> [37] There is no precise mathematical formula for the assessment of damages in defamation. A court in assessing appropriate and proper damages needs to be mindful of apportioning a sum that is a vindication and compensation of the

plaintiff proportionate to the harm suffered without, as one judge puts it, giving the impression to the plaintiff that a libelous suit can be the road to untaxed riches.

[30] After considering the material facts in the case at hand, we agree with learned counsel for the appellant that the damages awarded by the learned trial judge ought to be varried. We have considered the following material facts before reducing the award to a global award of RM100,000 as damages to the respondent:

(a) the nature of what was stated in the said article cannot be seen as something exceptionally grave. The respondent was never said to be a person guilty of any wrongdoing in the said article. The article merely posed the questions whether his contract would be extended and mentioned several 'controversies' during his tenure;

(b) the appellant reported as the matter unfolded. As stated above, as soon as the appellant knew that the respondent's contract might be extended, it published articles entitled 'Keputusan Kedudukan Pengurus Besar PKNS Sudah Ada' and 'Othman Masih Lagi Pengurus Besar PKNS — MB Selangor';

(c) this is not a case that the appellant reported something which might be inaccurate and refused to clarify;

(d) the conduct of the trial was not oppressive in any sense towards the respondent. The respondent was treated well during cross-examination and the trial itself was not unduly postponed;

(e) it was never suggested or portrayed that the respondent is a person of poor character. There was no character assassination and the appellant's case remain focused on the issues at hand. Neither was there a personal attack on the respondent's character;

(f) the appellant never pleaded the defence of justification and dropped it later; and

(g) the said article was not published in the front page of the newspaper or given special prominence. In fact, it was published at p 24 of the newspaper.

[31] Based on the aforesaid, we unanimously dismissed the appellant's appeal on liability. However, the award of RM250,000 for general damages and the award of RM50,000 for aggravated damages made by the High Court were set aside and substituted with a global award in the sum of RM100,000 to the respondent with interest and costs of RM10,000 subject to payment of allocateur. We also ordered deposit to be refunded.

Appeal dismissed.

Reported by Ashok Kumar